SUPREME COURT, U. S.

No. 74-193

OCT 11 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

STATE OF WISCONSIN, *Petitioner*

v.

NATIONAL LIBERTY LIFE INSURANCE COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 62 Wis.2d 347, 215 N.W.2d 26, and is contained in pages 1-22 of the Appendix to the petition. The order denying the petitioner's motion below for a rehearing is reproduced on page 23 of the Appendix to the petition. The opinion of the Circuit Court of Dane County, Wisconsin, dated October 3, 1972, is unreported.

JURISDICTION

The jurisdiction of this Court is adequately stated at page 2 of the Petition.

QUESTIONS PRESENTED

(1) Whether a state gross premiums tax, now repealed, was invalid due to lack of fair apportionment as applied to an unlicensed foreign insurance company which transacted business in the state only through the mails, which had no office, agent, or property within the state, but which maintained all of its staff and facilities for its operations outside the state.

(2) Whether a state has power to tax an unlicensed, foreign insurance company which transacts business in the state only by mail and which has no office, agent or property in the state.

STATUTE INVOLVED

The pertinent provisions of the Wisconsin statute are set forth in the petition on pages 3-4.

STATEMENT

This case aros on a demurrer challenging the complaint for failure to state a cause of action. The trial court sustained the demurrer, but the Supreme Court of Wisconsin reversed the decision and held that a cause of action was adequately stated.

The record before this Court therefore consists of the allegations in the complaint, which is reproduced in the Appendix to this Brief.

Respondent is a Pennsylvania insurance company, not licensed in Wisconsin, which, prior to the decision of this Court in *People* v. *United National Life Insur-*

ance Company, 66 Cal. 2d 577, 58 Cal. Reptr. 599, 427 P.2d 199, appeal dismissed, 389 U.S. 330 (1967), sold insurance to Wisconsin residents through the mails. During the years in question respondent had no office, officer, agent, agency, or other representative in Wisconsin for the purpose of interviewing prospects, soliciting business, investigating risks, adjusting claims, or otherwise servicing policies, or for any kind of insurance business. Nor did it maintain any bank account, or own or lease personal or real property in Wisconsin.

All contacts between respondent and prospective applicants and policyholders, including solicitation of business through advertisements, the drafting, writing, issuance and delivery of policies, the collection of premiums and administration of policies, the investigation and payment of claims, and the maintenance and investment of reserves, were all carried out from the company's offices in Pennsylvania through the United States mails, and through telephone and telegraph services.

The Commissioner of Insurance of Wisconsin assessed gross premiums taxes in the amount of $60,532.83 for the years 1963 through 1969, pursuant to the statute held invalid by the judgment below. The tax was laid upon all premiums collected under policies issued to Wisconsin residents. The company paid the taxes under protest and duly commenced this action for refund.

The Court below held that, as applied to an unlicensed insurance company doing business in the state only by mail, the statute did not provide a proper method of apportionment of the receipts of the com-

pany. The petitioner is now seeking review of the judgment below on the apportionment issue. Respondent is content with the decision below.[1]

ARGUMENT

I. THE DECISION BELOW IS CORRECT

A. The Tax Is Invalid for Lack of Fair Apportionment

The requirement of apportionment has its roots in both the commerce clause and the due process clause of the Fourteenth Amendment. Although local activity of multi-state operations may be taxed, the commerce clause forbids the levying of taxes which impose direct burdens upon interstate commerce, such as a gross receipts tax on an interstate activity. *Fisher's Blend Station, Inc.* v. *State Tax Comm'n.*, 297 U.S. 650, 656 (1936); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 463 (1959); and *General Motors* v. *Washington*, 377 U.S. 436, 448-49 (1964). Proper apportionment can remove the threat of extraterritorial taxation and thereby satisfy the commerce clause.

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[1] However, the court below rejected an alternative argument by respondent that the state lacked jurisdiction over the company for the purpose of imposing the tax. Respondent has filed a contingent cross-appeal and docketed a jurisdictional statement (No. 74-238), solely for the purpose of preserving its right to defend the judgment below on the ground of lack of jurisdiction to tax in the event this petition is granted. In the absence of such a cross-appeal it would not be clear whether the respondent could present both issues in support of the judgment below. See *Strunk* v. *United States*, 412 U.S. 434, 439 (1973), and Stern, "When to Cross-Appeal or Cross-Petition, Certainty or Confusion?," 87 Harv. L. Rev. 763 (1974). If the Court denies the petition, respondent has requested in its jurisdictional statement that its cross-appeal be dismissed.

The lower court correctly recognized that the commerce clause was unavailable to the respondent in light of the McCarran Act, 59 Stat. 34, c. 20, § 2, codified at 15 U.S.C. § 1012. The McCarran Act granted to the states the power to regulate and tax insurance companies and thereby lifted the negative implications and restraints of the commerce clause from the states insofar as insurance taxation and regulation are concerned.[2]

The lower court, however, also correctly recognized that the requirement of apportionment rests as well upon the due process clause. A number of decisions of this Court have invalidated taxes because they reached property or activity outside the taxing jurisdiction and because they were in violation of the due process requirement that a state confine its taxation to property or activity within its borders. *E.g., Norfolk & Western R. Co.* v. *Missouri Tax Comm'n,* 390 U.S. 317, 329 (1968) (ad valorem tax on railroad rolling stock apportioned by track mileage); *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123, 132 (1931) (net income tax apportioned only by the location of real and personal property); *Wallace* v. *Hines,* 253 U.S. 66, 69

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[2] The business of insurance was originally held not to be interstate commerce, and so the negative implications of the commerce clause were not applicable to state taxation of insurance. *Paul* v. *Virginia,* 8 Wall. 168 (1868). Later, however, this line of cases was overruled and insurance was held to be interstate commerce and therefore subject to congressional regulation. *United States* v. *South-Eastern Underwriters Ass'n.,* 322 U.S. 533 (1944). In order to prevent the application of the negative implications of the commerce clause to the states which had traditionally regulated and taxed insurance companies, Congress enacted the McCarran Act, which was held constitutional in *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946).

(1920) (tax on value of stocks and bonds of railroad apportioned by track mileage).[3]

In the case of a multi-state business, a state may establish the value of local property or the value of a local privilege or it may allocate multi-state receipts to a local activity by examining the nature of an enterprise's business in other states. But when extraterritorial values or revenues are taken into account, their full worth may not be taxed. Apportionment is required to ensure that only that proportion of the property or activity benefited by the taxing jurisdiction is taxed:

> "When . . . there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders . . . the question is necessarily one of apportionment. . . ." *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123, 134 (1931).

Some leeway is permitted in fashioning an apportionment formula and usually an apportionment formula will be sustained if in the run of cases it produces a reasonably fair allocation of the subject taxed. But it is also open to the taxpayer to show that the apportionment method works a gross unfairness as applied to its particular circumstances:

> "[E]vidence may always be received which tends to show that a state has applied a method, which, albeit fair on its face, operates so as to reach profits

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[3] For other cases recognizing that the apportionment requirement rests upon due process, see *Butler Bros.* v. *McColgan,* 315 U.S. 501, 507 (1942) (net income tax); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 464 (1959) (net income tax); and see *American Oil Co.* v. *O'Neill,* 380 U.S. 454, 457 (1965) (business excise tax not applicable to out-of-state transactions).

> which are in no just sense attributable to transactions within its jurisdiction." *Id.*

See also *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n,* 390 U.S. 317, 326 (1968), *supra* (a formula, reasonable on its face, may be impermissible if, as applied to a particular taxpayer, it shows "gross overreaching").

The Wisconsin Supreme Court based its decision essentially on the latter ground. It found that the tax was upon all premiums collected by the respondent under policies issued to Wisconsin residents. Although mathematical exactitude is not required of an apportionment formula, the apportionment method here, based upon the single factor of location of sales, was found to be extraterritorial in result as applied to the respondent.

During the years in question, the respondent did business only by mail and, therefore, its property and activities were concentrated entirely in its home state of Pennsylvania. Although an exclusively sales-oriented approach would be reasonably fair as applied to a company with local offices and representatives, the complete absence of local activity or property in this case rendered the result sufficiently unjust to invalidate the tax.

The opinion of the lower court emphasized the unfairness of a single-factor sales formula as applied to a company which sells only by mail:

> "... The premium tax is in effect a single factor apportionment formula based solely upon receipts. Although the receipts are the result of a chain of activities beginning in the domiciliary state and ending with the capture of the premium in the risk

> state, the principal activities are at home. There are located the insurer's only office, all of its tangible properties and all of its employees. There is undertaken all of the study and research that leads to the writing of the policies, their form and content. There all the mortality and accident studies of an actuarial nature are made, and in effect the 'manufacture' of the insurance conducted. There the investment of the premiums is made and the reserves are accumulated out of which benefits are paid. The risk state premium tax, therefore, in focusing only upon the receipt of the premium, would seem to ignore by far the bulk of the activity involved." Petition at Page 20 of Appendix, citing Patty, "State Premium Taxes on Mail Order Insurance Under the Due Process Clause," 22 Tax Lawyer 363, 380 (1969).

The opinion below did not hold that a single-factor sales formula was always impermissible. It only held that a single-factor sales formula is impermissible as applied to a taxpayer whose operations and property are totally elsewhere and which has no contact or activity in the state other than by mail and periodicals. Compare *General Motors* v. *District of Columbia,* 380 U.S. 553, 561 (1965), where this Court said:

> "[T]he geographical distribution of a corporation's sales is, by itself, of dubious significance in indicating the locus of [a corporation's sources of income or the social costs which it generates]. . . . [I]t is sufficient to note that the factors alluded to by this Court in justifying apportionment measures constitutionally challenged in the past lend little support to the use of an exclusively sales-oriented approach."[4]

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[4] The position of the direct mail insurer is an *a fortiori* one under the principles of *General Motors* v. *District of Columbia.* Whereas General Motors admittedly had a very substantial pres-

B. The Petitioner Lacked Power to Tax the Respondent

Before a tax may be imposed by a state there must be local activity sufficient to form a nexus to justify the tax. The lower court held that the presence of insureds in the state constituted a sufficient nexus to permit Wisconsin to levy a properly apportioned tax on the respondent. Respondent disagrees and submits that the result below is additionally defensible on the ground that there was insufficient local activity to sustain the tax.[5]

In *State Board of Ins.* v. *Todd Shipyards,* 370 U.S. 451 (1962); *Allgeyer* v. *Louisiana,* 165 U.S. 578 (1897); *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U.S. 346 (1922); and *Connecticut General Co.* v. *Johnson,* 303 U.S. 77 (1938), this Court held, on due process grounds, that a state does not have jurisdiction to impose taxes with respect to insurance transactions entered into outside the state, even though the risks covered were inside the state. Similarly, in *Compañia General de Tabacos* v. *Collector,* 275 U.S. 87 (1927), the decisive presence or absence of an agent within the

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ence within the District of Columbia, including property of $1,360,000 and payroll of $1,268,000 in a typical year before the Court, it was improper to tax it under an apportionment formula based upon sales only. By contrast, the appellant has no property or payroll of any kind within the solicitation state.

Furthermore, the District tax was far less onerous than the instant tax. The use of the single factor of sales by the District merely *doubled a 5% net income tax* as compared with a tax apportioned conventionally on the basis of sales, property and payroll. In the instant case, however, the use of the single factor of gross receipts actually *tripled* a tax with the result that it was approximately equivalent to a *30% net income tax.*

[5] In order to preserve respondent's right to advance this argument in support of the judgment, respondent has filed a cross-appeal on this issue. *Supra* page 4, footnote 1.

jurisdiction was clearly demonstrated. The tax was upheld in the jurisdiction where an agent was present and denied in the other jurisdiction where there was no agent.

With one possible difference the instant case is governed by these cases. In those cases, it was not clear whether the transactions were isolated events rather than part of a continuous pattern of selling insurance in the risk state, as here. Continuous activity has, however, been held to make no difference in the case of a company doing business only by mail. In *National Bellas Hess* v. *Dep't of Revenue,* 386 U.S. 753 (1967), the Court held that Illinois could not require a foreign corporation engaged in a mail order business to *collect* a compensating use tax. *A fortiori,* it could not have imposed the heavier burden of the tax itself.

This Court said:

> "In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction . . . is a valid one, and we decline to obliterate it." *Id.,* at 758.

The lower court held that *National Bellas Hess* did not apply in the field of insurance because the burdens of taxation on mail order retail outlets were more onerous than on mail order insurance companies. The court reasoned that an insurance company already has a compilation of its policyholders by place of residence and amount of premiums and that the paperwork in re-

porting the tax would not be burdensome. Assuming this is so, it is difficult to see why it is any easier, or more common, for an insurance company to maintain such a list than it is for the seller of any other product. No explanation was given.

The lower court also assumed that Wisconsin's provisions for public health, safety and welfare conferred sufficient benefits upon the respondent that it was fair for the respondent to pay taxes for this benefit. Yet, this reasoning overlooks the fact that analogous incidental benefits were bestowed on National Bellas Hess which this Court held to be insufficient to justify even a requirement for the collection of a use tax. See *ibid,* at 761-62 (dissenting opinion).

Finally, the lower court analogized the standard for jurisdiction to tax to the standards for jurisdiction over foreign insurance companies for purposes of judicial process and regulation. It is true that service of process and regulatory standards have been relaxed in the insurance field just as they have been in other fields. *E.g., McGee* v. *Int'l Life Ins. Co.,* 355 U.S. 220 (1957) (service of process), and *People* v. *United Nat'l Life Ins. Co.,* 66 Cal. 2d 577, 58 Cal. Rptr. 599, 427 P.2d 199, appeal dismissed, 389 U.S. 330 (1967) (regulation). But it does not follow that these relaxed jurisdictional standards for service of process and regulation should be applied to taxation.

Insurance is of such importance to the family welfare that it is deemed essential that insurance companies be amenable to suit at the convenience of policyholders and be subject to broad state regulation. No special need exists, however, to relax traditional rules when it comes to raising general tax revenues. Compare *Freeman* v. *Hewit,* 329 U.S. 249, 253 (1946),

where the Court observed that "Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations . . . ."[6]

In the numerous insurance taxation cases considered by this Court no mention has ever been made of any special need to tax insurance companies or of the applicability of any special rules. This has been true of the decisions invalidating such taxes. *E.g., State Board of Ins.* v. *Todd Shipyards, supra; Allgeyer* v. *Louisiana, supra; St. Louis Cotton Compress Co.* v. *Arkansas, supra; and Connecticut General Co.* v. *Johnson, supra.* And, it has been true of decisions sustaining such taxes against challenges other than those involved in this case. See the cases relied on by the petitioner and discussed in the next part of this brief. The absence of any recognition of a special need to tax insurance companies in the face of so many opportunities to consider the point clearly indicates that this Court believes no such need exists.

In brief, no convincing reason exists for exempting the business of mail order insurance from the principles of *National Bellas Hess.*[7]

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[6] And compare, *e.g., Mintz* v. *Baldwin,* 289 U.S. 346 (1933), and *McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327 (1944), involving similar fact patterns, the former upholding jurisdiction to *regulate* and the latter denying jurisdiction to *tax.*

[7] The court below appears to have been unduly influenced by language in *Ministers Life and Casualty Union* v. *Haase,* 30 Wis. 2d 399, 141 N.W. 2d 287, appeal dismissed, 385 U.S. 205 (1966). But that was primarily a regulation case. Furthermore, there were quasi-agents involved so that jurisdiction to tax was clearly present under *Travelers Health Ass'n* v. *Virginia,* 339 U.S. 643

II. THERE IS NO CONFLICT OF DECISIONS

Contrary to the petitioner's argument, this Court has never sustained a gross premiums tax against a challenge on apportionment grounds. In the four cases relied upon, *Equitable Life Assur. Society* v. *Pennsylvania,* 238 U.S. 143 (1915); *Lincoln Nat'l. Life Ins. Co.* v. *Read,* 325 U.S. 673 (1945); *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946); and *Lutheran Mut. Life Ins. Co.* v. *State,* 242 Wis. 598, 9 N.W. 2d 82 (1943), the apportionment argument was not raised. Nor would it have been dispositive of this case had it been raised. In each of those cases, the company was doing business through local offices and agents. The application of the tax in each of these situations would clearly have resulted in fair apportionment under *General Motors* v. *Washington, supra.* The absence of local agents, property, or offices makes the instant case different.

Nor is the decision of the lower court in conflict with *City of Pittsburg* v. *Alco Parking Corp.,* — U.S. —, 41 L.Ed. 2d 132 (1974). There the issue was whether a tax can be so excessive as to violate the due process clause, and whether so burdensome a tax offends due process when the taxing authority is in business competition with the aggrieved taxpayer. The case did *not* involve a company doing business in several states and

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(1950) and *Scripto, Inc.* v. *Carson,* 362 U.S. 207 (1960). And finally, since the *Ministers* case, it has become clear that the use of an excessive and discriminatory premium tax cannot be justified on the ground that it is a necessary part of Wisconsin's insurance regulatory scheme, for the State now has reasonable constitutional alternatives adequate to conserve legitimate local interests. *People* v. *United Natl. Life Ins. Co.,* 66 Cal. 2d 577, 427 P.2d 199, appeal dismissed, 389 U.S. 330 (1967); *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951).

so no jurisdiction to tax or apportionment issues were involved.

Finally, the decision of the lower court is not contrary to *Standard Pressed Steel* v. *Dep't of Revenue,* 10 Wash. App. 45, 516 P.2d 1043 (1973), *prob. juris. noted,* — U.S. —, 41 L.Ed. 2d 1138 (1974) (Docket No. 73-1697). Nor should this case be held for *Standard Pressed Steel.*

That case involved the issue whether the involvement of a full time local agent (a "sales engineer") in the initiating of certain orders for goods was sufficient to permit those sales to be included within the measure of a Washington tax of 44/100 of 1% of gross receipts for the privilege of engaging in a wholesale business. The taxpayer argued that the tax discriminated against interstate commerce and resulted in multiple taxation. These issues derive from the commerce clause and are not implicated by the lower court's decision here which rested solely on the due process clause.

The taxpayer in *Standard Pressed Steel* did advance an argument on due process grounds challenging the power of the state to lay any tax at all upon the company. The argument, however, did not raise the issue of lack of apportionment, but only that the taxpayer had received so few benefits from Washington that it would offend due process to permit a tax.

Assuming there were an apportionment issue in *Standard Pressed Steel,* it would be sufficiently distinct from the apportionment issue in this case that the instant petition should be denied without being held for the final disposition in *Standard Pressed Steel.* Thus, were this Court to hold that the Washington tax could not be applied to *Standard Pressed Steel* for

lack of apportionment, the same result would be *a fortiori* here. If a single-factor-sales formula is impermissible when the taxpayer's sales representatives work in the state, then surely it is also impermissible when there are no representatives or property in the state. On the other hand, even if this Court held that apportionment is not required when agents are present, that holding would not be dispositive when no agents or property are present.[8]

III. THE PETITIONER HAS GREATLY EXAGGERATED THE IMPACT OF THE LOWER COURT'S JUDGMENT ON THE ADMINISTRATION OF STATE INSURANCE TAXES

Petitioner says it will lose all tax revenue from unauthorized foreign insurers unless this Court grants a writ of certiorari. Although the amount of such taxes is not specified, petitioner says it collects $22 million annually from foreign insurers. This amount, of course, includes collections from licensed insurers with local offices as well as unlicensed insurers. The full $22 million is by no means endangered since the opinion below states clearly that it only applies to unlicensed mail order companies which do not have local offices and representatives:

> "The in-state and out-of-state activities of a mail order insurer are sufficiently separable to require apportionment. With no place of business or agents within the state there would be no 'maze of local connections' which justified a gross receipts tax in the *General Motors* v. *Washington* case." (Page 20 of Appendix to Petition.)

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[8] The presence of the sales engineer also distinguishes *Pressed Steel* from the instant case on the jurisdiction to tax issue, so that its disposition would likewise not be relevant on respondent's cross-appeal. Compare *Compañia General, supra,* page 9.

The volume of premiums affected by the opinion below is thus necessarily small, and declining. Since the decisions in *Ministers Life and Casualty Union* v. *Haase,* 30 Wis.2d 339, 141 N.W.2d 287 (1966), and *People* v. *United National Life Ins. Co.,* 66 Cal.2d 577, 427 P.2d 199, appeal dismissed, 389 U.S. 330 (1967), *supra,* unlicensed mail order insurers can no longer solicit business in Wisconsin. They can only service policies solicited prior to the change in the law. Hence, the instant decision applies to only a minute area—the runoff of business solicited prior to 1968 by unlicensed companies having no payroll or property within Wisconsin—probably involving a small fraction of a percent of total premium collections.[9]

The decision below leaves undisturbed virtually the entire premium tax structure. When there are agents, property or offices within the state the opinion below makes it clear that *General Motors* v. *Washington* would govern. Only in the relatively rare case of the unlicensed mail order company, with no office, agent or property within the state, does the rule of the opinion below apply. Thus the decision below is not of general importance, and is not appropriate for review by this Court.

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[9] The same would be true generally in all other jurisdictions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX

Complaint in Circuit Court of Dane County, Wisconsin

COMPLAINT

(Formal Parts Omitted)

Now COMES the plaintiff above named by its attorneys, Aberg, Bell, Blake & Metzner, and alleges as follows:

(1) That the plaintiff, National Liberty Life Insurance Company, is and at all times material hereto was a foreign corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and that its principal offices are located at 150 Allendale Road, Valley Forge, Pennsylvania 19481, and it is and has been at all times material hereto engaged in the business of selling health and accident insurance and life insurance.

(2) That the defendant, State of Wisconsin, is a sovereign state.

(3) That the plaintiff did on or about the 29th day of April, 1969, make application to the defendant, through the Commissioner of Insurance, for a license to engage in the insurance business in the State of Wisconsin.

(4) That, on information and belief, at no time prior to the application for the license referred to in paragraph (3) above or thereafter, or any time material hereto, has the plaintiff had an office, officer, agent, agency or representative in the State of Wisconsin for the purpose of interviewing prospects, solicitation of insurance, investigating risks, adjusting claims, or otherwise servicing policies or policyholders in the State of Wisconsin, nor for the doing of any other kind of insurance business within the State of Wisconsin, nor has it ever owned or main-

tained any bank account or other personal property or real property within said state.

(5) That, on information and belief: (a) insurance policies sold to residents of Wisconsin are solicited exclusively by advertisements inserted by the plaintiff in newspapers and magazines published in or circulated in Wisconsin and by the delivery in Wisconsin of letters, brochures and pamphlets sent through the United States mail; (b) such policies are issued at the plaintiff's principal place of business at Valley Forge, Pennsylvania, on the basis of application forms completed by insureds and mailed to the plaintiff at Valley Forge, Pennsylvania; and, (c) such policies are delivered to the insureds by United States mail and are only effective when payment therefor is received by the plaintiff at Valley Forge, Pennsylvania.

(6) That, upon information and belief, all contacts between the plaintiff and Wisconsin resident policyholders, including the receipt of applications, the writing of policies, the delivery of policies, the collection of premiums and the investigation and payment of claims is carried on from Valley Forge, Pennsylvania, through the use of the United States mail and interstate telephone and telegraph services.

(7) That the defendant, through the Commissioner of Insurance, did assess premium taxes and penalties against the plaintiff in the sum of $60,532.83, as set forth in Exhibit A which is attached hereto and made a part of this Complaint, and did refuse to license the plaintiff as an insurer in the State of Wisconsin until the same were paid.

(8) That the plaintiff did on the 1st day of April, 1970, tender said aforementioned premium taxes and penalties, under protest, to the defendant through the Commissioner of Insurance to prevent additional penalties and in order to become licensed by the defendant.

(9) That the plaintiff has not yet been licensed by the defendant although it has complied with all the requirements of the Commissioner of Insurance.

(10) That the defendant improperly and without any right assessed and levied the aforesaid taxes, including penalties, against the plaintiff.

(11) That, on information and belief, the plaintiff's contacts with its insureds and prospective insureds in Wisconsin are activities in interstate commerce and that the premium taxes and penalties imposed on the plaintiff by the defendant impose an unreasonable burden upon interstate commerce.

(12) That the assessment and collection of the premium taxes and penalties described in paragraph (7) above deprives the plaintiff of its property without due process of law and denies to the plaintiff the equal protection of the laws under the Constitution of the United States and the Amendments thereto and under the provisions of the Wisconsin Constitution, and that the same are arbitrary, unreasonable and discriminatory.

(13) That the plaintiff is aggrieved with the meaning of Section 76.37(2) of the Wisconsin Statutes by the assessment and collection of the aforesaid tax and penalties.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $60,532.83 with interest thereon from April 1, 1970, as provided by law, for its costs and disbursements herein, and for such other or further relief as the Court may find plaintiff to be entitled.

ABERG, BELL, BLAKE & METZNER
Attorneys for Plaintiff